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SUPREME COURT, U.S.
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No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON, ET AL.,
Petitioner,

v.

PHILIP MORRIS COMPANIES, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE BLUE CROSS AND BLUE SHIELD ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE AMICUS CURIAE

The Blue Cross and Blue Shield Association ("BCBSA") is the national association of Blue Cross and Blue Shield companies. It comprises thirty-nine independent, locally owned Blue Cross and Blue Shield Plans. The Blue Cross and Blue Shield companies, through relationships with federal, state, and local government entities, employers, employee benefits plans, and individual subscribers, administer or insure health benefits for over 90 million Americans. In their relationships with the federal government, Blue Cross and Blue Shield Plans (often in conjunction with BCBSA) administer or insure health benefits under various federal programs through contracts with federal agencies, including: Medicare, which provides health benefits to the elderly (*see* 42 U.S.C. §§ 1395 *et seq.*); the Federal Employees Health Benefits Program ("FEHBP"), which provides health benefits to federal employees and annuitants and their dependents (*see* 5 U.S.C. §§ 8901-8914); and Tricare (formerly known as the Civilian Health and Medical Program of the Uniformed Services, or "CHAMPUS"), which provides health benefits to dependents of individuals in military service (*see* 10 U.S.C. §§ 1071 *et seq.*).[1]

This case involves the construction of 28 U.S.C. § 1442(a)(1), a statute that permits the removal of state court suits, in delineated circumstances, to federal court by agencies and officers of the United States and "any person acting under" them. In particular, in a matter of first impression for this Court, the case focuses on the extent to which a private party appropriately is deemed to be acting under a federal agency or officer, so as to invoke § 1442(a)(1). As entities involved, through government

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[1] In accordance with Rule 37.6, BCBSA certifies that counsel for a party did not author this brief in whole or in part and that no entity other than BCBSA, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

contracts, in the administering or insuring of health benefits under federal benefits programs, BCBSA's members have successfully relied on § 1442(a)(1) in prior instances. Because the Court's decision in this case may establish the governing standard for a private party's removal of a state court action under § 1442(a)(1), thereby potentially affecting the continued ability of BCBSA's members to invoke the statute, BCBSA has an interest in this case.

BCBSA, however, takes no position on the correct outcome for the case. Its interest is in the Court's establishment of the proper legal standard for a private party's removal of a state court action under § 1442(a)(1), a standard that should be consistent with the substantial body of existing case law readily allowing government contractors, especially those administering significant federal health benefits programs, the right to remove actions to federal court.

Counsel for the parties have filed letters with the Clerk of the Court consenting to the filing of all *amicus* briefs in this case.

SUMMARY OF ARGUMENT

The Eighth Circuit's decision in this case raises the question of who properly is deemed a "person acting under" a federal officer or agency for purposes of removal under § 1442(a)(1), a statute that this Court has long given a liberal construction. As the lower courts have consistently held, the operative language can encompass private parties. Its extension in appropriate circumstances to private parties derives from the fact that, with increasing frequency, the government must rely on relationships with private entities to accomplish its many objectives.

Though the courts thus far have not established a hard-and-fast rule for determining when a private party is "acting under" a federal officer or agency, two lines of authority have emerged under which the courts agree that private parties may invoke § 1442(a)(1). First, the courts have

regularly held that the statute covers government contractors who are sued under state law for actions taken at the direction of a federal officer or agency. Second, the courts agree that private entities (including government contractors) who administer on-going federal programs, in particular federal health benefits programs, are entitled to remove under § 1442(a)(1). In the latter decisions, removal is warranted even if the government has not specifically directed the activities at issue in the case, so long as the plaintiff's allegations arise from actions taken by the private party in the course of administering the federal program.

The Respondents' situation does not fall squarely within the confines of these decisions, and BCBSA takes no position on whether the Court should further extend § 1442(a)(1) to cover this case. At a minimum, however, the Court should, in resolving the question in this matter, ensure that any standard established for the removal of actions by private parties under § 1442(a)(1) is broad enough to allow for removal in situations similar to those involved in the government-contractor and federal-programs precedents. The decisions are well-established, are well-reasoned, are consistent with § 1442(a)(1)'s purposes, and have never been questioned by Congress.

ARGUMENT

I. SECTION 1442(a)(1) BROADLY ENCOMPASSES REMOVAL BY PRIVATE PARTIES

Under 28 U.S.C. § 1442(a)(1), a "civil action or criminal prosecution commenced in a State Court . . . may be removed . . . to the [appropriate] district court of the United States" if it is brought against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office." The statute has a lineage dating back to 1815, with Congress having enacted the current iteration in 1948 and amended it in 1996. *See Willingham v. Morgan*,

395 U.S. 402, 405 (1969); Federal Courts Improvements Act of 1996, Pub. L. No. 104-317, § 206(a), 110 Stat. 3847, 3850.

Section 1442(a)(1)'s purpose "is not hard to discern." *Willingham*, 395 U.S. at 406. It is designed to "protect" federal authorities "from interference by hostile state courts." *Id.* at 405. In this regard, from the time of its first decisions addressing the statute, the Court has emphasized:

> [T]he Federal Government "can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection, -- if their protection must be left to the action of the State court, -- the operations of the general government may at any time be arrested at the will of one of its members."

Id. at 406 (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1880)).

Because the statute "'is an incident of federal supremacy,'" it is to be given a "broad application." *Peterson v. Blue Cross/Blue Shield of Tex.*, 508 F.2d 55, 58 (5th Cir. 1975) (quoting *Willingham*, 395 U.S. at 405); *accord Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998) (listing decisions involving § 1442(a)(1) that "not[e] Supreme Court requirement of liberal interpretation"). Section 1442(a)(1) "is not 'narrow' or 'limited,'" *Willingham*, 395 U.S. at 406 (quoting *Colorado v. Symes*, 286 U.S. 510, 517 (1932)), and this Court has repeatedly rejected "a 'narrow, grudging interpretation' of the statute." *Jefferson County v. Acker*,

527 U.S. 423, 431 (1999) (quoting *Willingham*, 395 U.S. at 407); *accord Arizona v. Manypenny*, 451 U.S. 232, 242 (1981). The statute's liberal interpretation thus stands in contrast to other removal provisions, such as 28 U.S.C. § 1441 (permitting removal based on diversity of citizenship or the existence of a federal question), which sometimes has been afforded a "strict construction." *Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941); *see also Jefferson County*, 527 U.S. at 430-31.

Applying the rule of liberal interpretation to § 1442(a)(1)'s requirement that removal be available to federal authorities sued "for any act under color of [their] office" (28 U.S.C. § 1442(a)(1)), the Court has said: "At the very least, [the statute] . . . is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." *Willingham*, 395 U.S. at 406-07 (citation omitted). Indeed, "'one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court.'" *Jefferson County*, 527 U.S. at 431 (quoting *Willingham*, 395 U.S. at 407)).

Also consistent with § 1442(a)(1)'s broad scope, and especially pertinent for the question in this case, is the courts' interpretation of the statutory language authorizing removal by "any officer (*or any person acting under that officer*) of the United States or of any agency thereof." 28 U.S.C. § 1442(a)(1) (emphasis added). Applying that language, the courts universally have held that "the reach of section 1442(a)(1) extends to *private* persons." *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 486 (1st Cir. 1989) (emphasis added). Hence, "[a]lthough the primary beneficiaries of § 1442(a) are federal officers and agencies, a private party may also invoke the statute." *Parks v. Guidant Corp.*, 402 F. Supp. 2d 964, 967 (N.D. Ind. 2005). The statute "clearly contemplates that a private actor can claim its protection when it is threatened with liability for

actions taken on behalf of a federal officer." *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 845 (N.D. W. Va. 2004).[2]

The extension of § 1442(a)(1)'s removal authority to private persons makes good sense in light of the increasing frequency with which the government must use private means to accomplish its objectives. "The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions . . . ." *Barr v. Matteo*, 360 U.S. 564, 573 (1959). That includes delegation to, for instance, "'officers of lower rank in the executive hierarchy' or . . . private contractors." *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 73 (2d Cir. 1998). No less than federal officers and agencies, private persons to whom the government has delegated its functions should be entitled, where their "official duties" are questioned under state law, to "a trial upon the merits of the state-law question free from local interests or prejudice." *Arizona v. Manypenny*, 451 U.S. at 241, 242.

II. GOVERNMENT CONTRACTORS ACTING PURSUANT TO SPECIFIC GOVERNMENT DIRECTIVES QUALIFY FOR REMOVAL UNDER § 1442(a)(1)

Section 1442(a)(1)'s operative language with respect to removal by private persons focuses the inquiry on whether the party is "acting under" a federal officer or agency.

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[2] *Accord Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 418 (5th Cir. 2001); *Greene v. Citigroup, Inc.*, 2000 U.S. App. LEXIS 11350, at *6 (10th Cir. May 19, 2000); *Winters*, 149 F.3d at 398; *California v. H&H Ship Serv. Co.*, 1995 U.S. App. LEXIS 30986, at *4-*5 (9th Cir. Oct. 17, 1995); *Venezia v. Robinson*, 16 F.3d 209, 212 (7th Cir. 1994); *Camacho*, 868 F.2d at 487; *Ely Valley Mines, Inc. v. Hartford Accident & Indem. Co.*, 644 F.2d 1310, 1313 (9th Cir. 1981); *Noble v. Employers Ins. of Wausau*, 555 F.2d 1257, 1259 (5th Cir. 1977); *Peterson*, 508 F.2d at 58; *Hazen v. S. Hills Nat'l Bank*, 414 F.2d 778, 779 (10th Cir. 1969); *Texas ex rel. Falkner v. Nat'l Bank of Commerce*, 290 F.2d 229, 230 (5th Cir. 1961).

Following from that language, the widespread rule is that removal is available to private parties "who act *under the direction of* federal officers." *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 486 (1st Cir. 1989) (emphasis added); *accord Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 399 (5th Cir. 1998); *Gurda Farms, Inc. v. Monroe County Legal Assistance Corp.*, 358 F. Supp. 841, 844 (S.D.N.Y. 1973).

There so far, however, has been "no precise standard for the extent of control necessary to bring . . . [a private] individual with[in] the 'acting under' clause." *Gurda Farms*, 358 F. Supp. at 844. As one district court has put it: "The number and complexity of federal institutions and programs would render impossible the formulation of such a standard. What it comes down to is that the court in each case must ascertain to what extent defendants act under federal direction and to what extent as independent agents." *Id.*

Though no precise formulation exists for determining when a private party acts sufficiently under the direction of a federal officer to invoke § 1442(a)(1), the courts have coalesced around certain principles. One is that a government contractor acting pursuant to specific instructions imposed by the government may remove a state court suit in which it is sued for its actions pursuant to those instructions. Several decisions prove the point. For instance, in *Winters*, the plaintiff sued a manufacturer of Agent Orange, alleging under state law that the product was defective and cancer-causing. The Fifth Circuit upheld the manufacturer's removal of the case to federal court under § 1442(a)(1). Reviewing the evidence, the court was "convinced that the government's detailed specifications concerning the make-up, packaging, and delivery of Agent Orange, the compulsion to provide the product to the government's specifications, and the on-going supervision the government exercised over the formulation, packaging, and delivery of Agent Orange is all quite sufficient to

demonstrate that the defendants acted pursuant to federal direction." *Winters*, 149 F.3d at 399-400.

In *Akin v. Big Three Indus., Inc.*, 851 F. Supp. 819 (E.D. Tex. 1994), the "[p]laintiff allege[d] multiple adverse health affects resulting from work performed on jet engines manufactured for the United States Air Force." *Id.* at 821. The manufacturer performed the work pursuant to government contracts, and the court upheld the manufacturer's removal of the case from state court to federal court under § 1442(a)(1). "Plainly, when a government contractor builds a product pursuant to Air Force specifications and is later sued because compliance with those specifications allegedly causes personal injuries," § 1442(a)(1)'s "requirement is satisfied." *Akin*, 851 F. Supp. at 823-24.

In *Fung v. Abex Corp.*, 816 F. Supp. 569 (N.D. Cal. 1992), the plaintiffs brought a state court action for injuries resulting from exposure to asbestos while on naval ships "constructed by General Dynamics pursuant to federal contract." *Id.* at 571. Finding removal proper under § 1442(a)(1), the court said: the government "monitored General Dynamics' performance at all times and required the defendant to construct and repair the vessels in accordance with the applicable and approved specifications incorporated into the contracts"; "all contract supplies were subject to inspection, test, and approval by the government"; and "[t]he government also performed extensive dock and sea trials on the submarines prior to commission, to ensure complete conformity with design specifications." *Fung*, 816 F. Supp. at 572-73.

These decisions, and others like them, *see, e.g., Pack v. AC & S, Inc.*, 838 F. Supp. 1099 (D. Md. 1993); *Gulati v. Zuckerman*, 723 F. Supp. 353 (E.D. Pa. 1989), set forth the established rule that, under § 1442(a)(1), "removal is proper when the lawsuit arises out of actions taken by a government contractor at the direction of a federal officer." *Akin*, 851 F.

Supp. at 823. In such instances, the government "exercise[s] 'direct and detailed' control" over the private actions at issue, satisfying "the 'acting under' requirement of § 1442(a)(1)." *Fung*, 816 F. Supp. at 573 (quoting *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 947 (E.D.N.Y. 1992)).[3]

III. PRIVATE PARTIES ADMINISTERING FEDERAL PROGRAMS ENJOY ESPECIALLY BROAD REMOVAL RIGHTS UNDER § 1442(a)(1)

Another point of consensus among the courts is that private entities assisting in the administration of federal programs, particularly federal health benefits programs, may remove state court actions under § 1442(a)(1) when sued for actions falling within their official functions. These cases

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[3] Courts also now agree that the term "person" in § 1442(a)(1) does not refer simply to private individuals, but also to private corporations. *See, e.g.*, *Winters*, 149 F.3d at 398; *Camacho*, 868 F.2d at 486; *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 844 (N.D. W. Va. 2004); *Thompson v. Community Ins. Co.*, 1999 U.S. Dist. LEXIS 21725, at *9 (S.D. Ohio Mar. 3, 1999). After this Court's decision in *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72 (1991), where the Court in reviewing a predecessor to the current § 1442(a)(1) found that the statute permitted removal by individual federal officers but not agencies, a few courts read "person acting under" a federal officer to embody a similar principle excluding collective entities as opposed to individuals. *See Arnold v. Blue Cross & Blue Shield*, 973 F. Supp. 2d 726, 739 (S.D. Tex. 1997); *Krangel v. Crown*, 791 F. Supp. 1436, 1442 (S.D. Cal. 1992); *cf. Virden*, 304 F. Supp. at 844 (noting that the "majority position" was always that corporations could be "persons" under § 1442(a)(1)). In 1996, Congress enacted the current statutory language expressly providing agencies with a removal right, thereby "overrul[ing] the Supreme Court's ruling in 1991 that a federal officer, but not a federal agency, could effect removal pursuant to the statute." *Winters*, 149 F.3d at 397. Because § 1442(a)(1) in no manner currently evinces in any of its parts an intent to cover solely individuals, there should be no question that a corporation can be a person under § 1442(a)(1). *See* 1 U.S.C. § 1 ("[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise -- . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals").

contrast with the decisions authorizing removal for government contractors acting pursuant to direct and detailed governmental instructions, in that courts have allowed private parties administering government programs (who also typically are government contractors) to remove state court lawsuits even where there is no evidence that the government *specifically* directed the activities at issue. It is enough that the defendant's "relationship to the plaintiff 'derived solely from [his] official duties.'" *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1427-28 (11th Cir. 1996) (quoting *Willingham v. Morgan*, 395 U.S. 402, 409 (1969)).

To this effect, many courts have recognized that Medicare fiscal intermediaries and carriers responsible for, among other things, approving or denying Medicare claims are persons acting under federal officers for purposes of § 1442(a)(1). *E.g.*, *Peterson v. Blue Cross/Blue Shield of Tex.*, 508 F.2d 55, 58 (5th Cir. 1977); *Peterson v. Weinberger*, 508 F.2d 45, 51 (5th Cir. 1977); *Freeze v. Coastal Bend Foot Specialist*, 2006 U.S. Dist. LEXIS 87156, at *9 (S.D. Tex. Dec. 1, 2006); *Thompson v. Community Ins. Co.*, 1999 U.S. Dist. LEXIS 21725 (S.D. Ohio Mar. 3, 1999); *Pani v. Empire Blue Cross Blue Shield*, 1996 U.S. Dist. LEXIS 19054 (S.D.N.Y. Dec. 23, 1996); *Roberts v. Hay*, 1992 U.S. Dist. LEXIS 22720, at *22-*23 (N.D. Ala. June 9, 1992); *Neurological Assocs. v. Blue Cross/Blue Shield of Fla., Inc.*, 632 F. Supp. 1078, 1080 (S.D. Fla. 1986); *Group Health Inc. v. Blue Cross Ass'n*, 587 F. Supp. 887, 890-91 (S.D.N.Y. 1984); *Kuenstler v. Occidental Life Ins. Co.*, 292 F. Supp. 532, 534-35 (C.D. Cal. 1968); *Allen v. Allen*, 291 F. Supp. 312, 314 (S.D. Iowa 1968). The decisions in *Thompson*, *Group Health Inc.*, and *Pani* are particularly instructive as to the breadth of the private party's removal rights.

In *Thompson*, the defendant was a health maintenance organization ("HMO") under contract with the Health Care Financing Administration ("HCFA"), the predecessor of the

Centers for Medicare and Medicaid Services; under the contract, the HMO was responsible for processing Medicare claims and reimbursing service providers. When the HMO elected to reduce its service area, enrollees brought suit in state court, and the HMO removed the case to federal court under § 1442(a)(1). The court denied a motion to remand, noting that the HMO's contracts with the enrollees were "a product of the federal government delegating its administrative obligations to the Defendant." *Thompson*, 1999 U.S. Dist. LEXIS 21725, at *12-*13. The court noted that "Defendant's relationship with the Plaintiffs was governed, from its inception through its ultimate termination, by a multitude of contractual, administrative, and statutory regulations" imposed by HCFA. *Id.* Though the HMO's service-area reduction was not "pursuant to a direct order" of HCFA, the HMO's actions nonetheless were under the direction of a federal officer because the HMO was subject to "comprehensive and detailed regulations." *Id.* at *20.

In *Group Health, Inc.*, resting on § 1442(a)(1), the court denied a motion to remand even though the plaintiff alleged that the intermediary -- in denying reimbursement for medical services -- exceeded the scope of the authority delegated by the government:

> The actions of Blue Cross at issue here were taken in Blue Cross's role as fiscal intermediary. Those actions thus were taken under color of the office of the Secretary of HHS, regardless of whether Blue Cross's initial determination was right or wrong, negligently or properly given, and regardless of whether Blue Cross should have consulted with, or did consult, HHS before giving the advice.

Group Health, Inc., 587 F. Supp. at 891. Likewise, in *Pani*, the court recognized that Medicare fiscal intermediaries "act as agents" of the federal government, and do so even when

they act "negligently or exceed[] [their] authority under the Medicare Act." *Pani*, 1996 U.S. Dist. LEXIS 19054, at *4. The relevant question, the court held, is "whether Pani's relationship with Empire derived solely from the latter's official duties," and since it did, removal under § 1442(a)(1) was proper. *Id.*; *see generally Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60, 65 (1984) (treating Medicare intermediaries as government "agents").

Private entities administering other federal health benefits programs have enjoyed similarly broad removal rights under § 1442(a)(1). In *Holton v. Blue Cross and Blue Shield of South Carolina*, 56 F. Supp. 2d 1347 (M.D. Ala. 1999), the court upheld removal under § 1442(a)(1) by a carrier administering a CHAMPUS plan for dependents of military service personnel. The carrier "act[s] as an agent of the United States" in that capacity. *Id.* at 1351-52. And in *Alabama Dental Ass'n v. Blue Cross & Blue Shield of Alabama, Inc.*, 2007 U.S. Dist. LEXIS 685, at *25 (M.D. Ala. Jan. 3, 2007), the court found removal under § 1442(a)(1) proper in a suit against a carrier administering an FEHBP plan for federal employees and annuitants and their dependents. The court ruled that, because the defendant had contracted with the United States Office of Personnel Management ("OPM"), which "exercised supervisory authority over the claims process for providers who seek reimbursement" for services supplied to FEHBP enrollees, the defendant was "acting under" OPM: the agency had "delineated a specific administrative regime" for assessing claims, and the defendant acted in compliance with OPM's directives. *Id.* at *23-*25.

In each of these many instances, the expansive removal rights stem from the fact that the state court suits implicate substantial, continuing federal programs. "The insurers act as continuing conduits for government policy and the state court lawsuits had the potential to interfere with an ongoing federal program." *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 951 (E.D.N.Y. 1992). Treating them as persons acting

under the government for removal purposes therefore "is consistent with the statutory goal [in § 1442(a)(1)] . . . to prevent suits from inhibiting federal policy." *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 844 (N.D. W. Va. 2004). Even absent specific directions from the government on the particular matter at issue in the case, removal lies in these circumstances, for there is a "federal interest in the matter." *Willingham*, 395 U.S. at 406 (internal quotation marks omitted).

These decisions also comport with this Court's instruction that § 1442(a)(1) should be available to "enable[] the defendant to have the validity of his immunity defense adjudicated in a federal forum." *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981). Numerous courts have held that entities administering federal health benefits programs can assert the same official and sovereign immunities as the government itself, in light of their close relationship with the government and their delegated responsibilities. *E.g., Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 72-74, 1003-05 (2d Cir. 1998) (official immunity); *Midland Psychiatric Assocs., Inc. v. United States*, 145 F.3d 1000, 1003-05 (8th Cir. 1998) (official immunity); *Matranga v. Travelers Ins. Co.*, 563 F.2d 677 (5th Cir. 1977) (sovereign immunity); *Pine View Gardens, Inc. v. Mutual of Omaha Ins. Co.*, 485 F.2d 1073, 1074 (D.C. Cir. 1973) (sovereign immunity). Because the entities can invoke governmental immunities, whose litigation is at the heart of § 1442(a)(1), the statute should be readily available to them.

Finally, even outside of the arena of health benefits, the courts have liberally applied § 1442(a)(1) if the private parties were engaged in the administration of an on-going federal grogram. *E.g., Gurda Farms, Inc. v. Monroe County Legal Assistance Corp.*, 358 F. Supp. 841, 844-45 (S.D.N.Y. 1985) (federal program for providing legal services to indigent migrant workers); *Dixon v. Georgia Indigent Legal Services, Inc.*, 388 F. Supp. 1156, 1162 (S.D. Ga. 1974) (same); *Oregon v. Cameron*, 290 F. Supp. 36, 37 (D. Or.

1968) (program establishing Volunteers In Service To America (VISTA)); *see also Texas ex rel. Falkner v. Nat'l Bank of Commerce*, 290 F.2d 229 (5th Cir. 1961) (program establishing banks on military bases); *First Nat'l Bank v. Bank of Bellevue*, 341 F. Supp. 960 (D. Neb. 1972) (same).

IV. THE COURT'S STANDARD FOR REMOVAL BY A PRIVATE PARTY UNDER § 1442(a)(1) SHOULD EMBRACE GOVERNMENT CONTRACTORS ACTING UNDER SPECIFIC DIRECTIONS AND ENTITIES ADMINISTERING FEDERAL PROGRAMS

The Respondents in this case (*i.e.*, the defendant in the underlying action who invoked § 1442(a)(1)) is neither a government contractor acting pursuant to specific directions nor a party administering an on-going federal program. Instead, it falls on the continuum further afield from government involvement, where the private party, in the Eighth Circuit's view, participated in a heavily regulated industry and acted pursuant to "comprehensive, detailed regulation[s]." *Watson v. Philip Morris Cos.*, 420 F.3d 852, 857 (8th Cir. 2005).

BCBSA takes no position on whether § 1442(a)(1) extends to Respondents' situation. But insofar as the Court must, in resolving this case, address the circumstances under which a private party is a "person acting under" a federal officer or agency, the Court should establish a standard broad enough to encompass government contractors implementing government specifications and entities (including contractors) who administer continuing federal programs. "If the [private] actor is effectively an agent or employee of the government because its activities are controlled and funded by the government, it is entitled to the same jurisdictional protection as the government itself." *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 846 (N.D. W. Va. 2004); *accord Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991) (private actors "so

intimately involved with government functions as to occupy essentially the position of an employee of the government" may remove under § 1442(a)(1)).

The decisions permitting government contractors and entities administering federal programs to remove state court actions pursuant to § 1442(a)(1) are legion and span many decades; they are well-reasoned; and Congress necessarily was aware of the decisions when it amended the statute in 1996 but did not alter the language regarding "person[s] acting under" federal officers and agencies. The Court should incorporate the reasoning and results of these precedents into any standard it formulates for removal by persons acting under federal authorities. In the end, "Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum," and extending § 1442(a)(1) to government contractors acting pursuant to the government's specific directives and to parties administering the government's on-going programs is in full accord with Congress's intention. *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969).

CONCLUSION

The Court should formulate a standard under § 1442(a)(1) that, at a minimum, allows for removal by government contractors acting pursuant to specific government directives and by government contractors and other private entities administering federal programs.

Respectfully submitted,

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